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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, California State Prison at San Quentin, *Petitioner*,

v.

FREDDIE LEE TAYLOR, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent Freddie Lee Taylor (Taylor) contends that certiorari should be denied because the procedural posture of this case cannot recur in light of the Ninth Circuit Court of Appeals' recent rulings, and because the State's argument that Taylor's amended petition will be abusive is premature. Typically, Taylor ignores the central argument in the State's petition and distorts the procedural posture of this and similarly situated cases in an effort to portray compliance with the rules governing habeas corpus. His effort falls woefully short.

The Widely Recurring Practice of Abeyance Pending Exhaustion Arises in Both Pre- and Post-Act Cases and Will Continue Unless Halted by this Court

Taylor contends the issue raised in the State's petition affects only a handful of cases and that "the stay and abeyance procedure was a measured response to manage petitions brought during a maelstrom of changes in the law, a circumstance which only existed for a brief window of time." Opp. at 6. His contentions are not only meritless, they are contradicted by his own argument.

In 1995, Taylor deliberately filed a mixed petition under former Northern District Local Rule 296-8(e). The State moved to dismiss the petition on exhaustion grounds. The District Court declined to dismiss the petition, stating instead that it would hold the mixed petition in abeyance pending exhaustion in state court. The District Court further stated it would issue a ruling identifying the claims it found unexhausted, yet no ruling issued.

Well over a year later, the Ninth Circuit held that the previous practice of holding mixed petitions in abeyance would no longer be permitted. *Calderon v. United States District Court (Gordon)*, 107 F.3d 756 (9th Cir.), *cert. denied*, 118 S.Ct. 265 (1997); *Greenawalt v. Stewart*, 105 F.3d 1268 (9th Cir.), *cert. denied*, 117 S.Ct. 1794 (1997). The State moved for reconsideration of the District Court's oral ruling that it would hold Taylor's mixed petition in abeyance. The District Court ultimately ruled that Taylor could delete his unexhausted claims, that it would hold the amended petition containing only exhausted claims in abeyance, that Taylor could pursue exhaustion of his remaining claims in state court, and that following exhaustion, he could file a second amended petition in the District Court.

On June 27, 1997, Taylor filed his second petition for writ of habeas corpus in the California Supreme Court, the first having been denied on September 26, 1990. On December 17, 1997, the California Supreme Court asked the State to respond to the petition. The State's response was filed on June 1, 1998, and the petition remains pending in state court. Taylor's federal petition remains abeyant in federal court.

Contrary to Taylor's argument in opposition, the issue before this Court is *not* whether a district court can hold in abeyance a *mixed* petition, *nor* is it whether the former local rule was invalid. The Court of Appeals resolved those issues against Taylor and similarly situated petitioners well before the District Court ruled on the

State's motion to dismiss, as the District Court acknowledged. App. B at 30-33. However, the District Court found a simple way around the Court of Appeals' proscription against holding mixed petitions in abeyance. It simply directed Taylor to delete the unexhausted claims and then ruled it could hold a petition containing only exhausted claims in abeyance. App. B at 39-46.

The issue raised in the Court of Appeals, and the issue raised here, is whether a district court can hold in abeyance a petition containing only exhausted claims so that the petitioner can return to state court to pursue exhaustion of his remaining claims, and thereafter return to federal court with an amended petition. The issue can and will arise in cases in which the initial petition was filed before enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (Act) (as it did here and in *Calderon v. United States District Court (Thomas)*, ___ F.3d ___, 1998 WL 236971 (9th Cir. 1998) (allowing abeyance *and* discovery on the "abeyant" petition), *petition for rehearing and rehearing en banc pending)*, and in cases in which the petition was filed after enactment of the Act (e.g., *Ashmus v. Calderon*, 977 F.Supp. 987 (N.D. Cal. 1997)).[1]

That Taylor initially filed a mixed petition is inconsequential to the breadth and scope of the issue presented in the instant petition. The question presented, which can and assuredly will arise regardless whether a

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1. A sampling of habeas cases in which district courts in California have issued unpublished orders holding petitions abeyant pending exhaustion of additional claims in state court include: *Anthony v. Cambra*, No. C-97-2232-FMS; *Clark v. Calderon*, No. C-97-20618-JW; *Rodrigues v. Calderon*, No. C-96-1831-CW; *Nicolaus v. Calderon*, No. C-95-2335-MMC; *Johnson v. Calderon,* No. C-95-0305-TEH; *Freeman v. Calderon*, No. C-95-3368-FMS; *Roberts v. Calderon*, No. CIV-S-93-0254-GEB; and *Mickle v. Calderon*, No. C-92-2951-TEH.

mixed petition was filed initially, concerns abeyance of a presumptively valid petition for the sole purpose of awaiting exhaustion of claims of which a petitioner was aware when he filed the petition. That situation has arisen in numerous cases in which petitioners have filed habeas petitions to effect ostensible compliance with the Act's statute of limitations, but in which the petitioners have asked for abeyance in order to exhaust claims that could not yet be included in the petition. The issue is not limited to cases solely in the identical procedural posture as Taylor's.

The issue whether petitions can be held in abeyance pending exhaustion is thus not limited to pre-Act cases or cases in which mixed petitions were filed, nor is it limited to cases in which petitions were being filed during a period of change in the law. Taylor's citation to earlier cases and to cases from other circuits that have allowed the abeyance procedure, Opp. at 11-12, 14-16, nn.22, 23, shows that the procedural device has been utilized since well before passage of the Act, and that its application has nothing to do with any "maelstrom of changes in the law," but is simply a contrivance to defeat *Rose v. Lundy*, 455 U.S. 509 (1982). In that case, the Court stated a clear and simple rule for habeas petitioners: before bringing *any* claims to federal court, make sure that *each* claim has been exhausted in state court so that a *single* petition may be filed. *Id.* at 520. That the avoidance of this simple rule is as widespread as petitioner contends is hardly reason to throw out the rule, rather than demand compliance. The widespread employment of the abeyance artifice, both in the district courts and the courts of appeals, also defeats *In re Blodgett*, 502 U.S. 236, 239-40 (1992) and *McCleskey v. Zant*, 499 U.S. 467 (1991).

Moreover, Taylor's argument that abeyance has been widely utilized is directly contrary to his claim that abeyance is merely a "measured response" to circumstances existing only in a brief window of time, and

only in California at that. *See* Opp. at 6. Taylor's willingness to engage in such transparently hollow arguments demonstrates his utter failure to take the rules governing habeas seriously.

Noncapital pro se petitioners have recently begun to realize that they, too, can distort the rules of habeas just as easily as capital petitioners represented by counsel. Pro se petitioners are now asking for abeyance of their petitions so that they can return to state court to exhaust claims, seemingly secure in the knowledge that they have staked out their spot in federal court with an ostensibly timely petition.[2/] Whether the initial petition is mixed or contains only exhausted claims, the requested relief is the same. A mixed petition can easily be amended to delete unexhausted claims, as here, or the petitioner can file only the exhausted claims in the first instance.[3/] Either way, the petitioner asks for abeyance pending exhaustion, thus nullifying the rule of *Rose*.

Ignoring the State's argument and the legal landscape of which he is well aware, Taylor piously asserts that he has "proceeded with the utmost attention to all filing deadlines and has never sought any unwarranted delay." Opp. at 2. He ignores the fact that there were *no* filing

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2. The standard argument, both by petitioners and by district courts, is that Rule 15(c), Federal Rules of Civil Procedure, allows relation back of any amendment in a habeas proceeding. *See* Opp. at 20; Petition for Writ of Mandate to the Ninth Circuit, Exhibit D at 10, 17. Hence, the statute of limitations is nearly rendered meaningless.

3. Petitioners are now careful to seek abeyance on petitions containing only exhausted claims because of amended 28 U.S.C. § 2244(b)(1), which mandates dismissal of claims filed in a second or successive application that were presented in a prior application. An unexhausted claim presented in a prior application, even if deleted to avoid the mixed petition proscription, would thus be barred. *Compare* 28 U.S.C. § 2244(b) (1966) (allowing dismissal of successive claim if claim was previously denied on the merits).

deadlines until the Act was passed, and that he has vigorously opposed the application of any filing deadlines to his case. He also ignores the fact that his case has been pending in federal court for well over six years; that it took his two federally funded attorneys over three years to file a defective, mixed petition; that he took no steps to exhaust his many unexhausted claims during the next two years, despite his attorneys' expertise in habeas proceedings and knowledge of which claims they had not presented in state court; and that it was not until the District Court finally ordered him to delete his unexhausted claims and return with them to state court that he took any action at all.

Taylor's claim of adherence to the rules governing habeas petitions at the time he first filed his petition means only that he took his time filing that petition, which was deliberately defective, comfortable in the knowledge that the District Court would permit the delayed filing and that he would suffer no adverse consequences. It was not until the Act was passed, and the Court of Appeals prohibited the abeyance of mixed petitions, that Taylor realized he might actually have to litigate his claims. However, the District Court, at his suggestion, managed to circumvent the Court of Appeals' effort to restore some meaning to the exhaustion doctrine. It utilized the procedural device at issue here--the abeyance of an exhausted claims petition. The Court of Appeals, determining itself bound by prior precedent in a related context, felt compelled to deny mandamus.[4/]

Taylor's claim that the device simply reflects the District Court's effort to control its docket, Opp. at 11, is patently frivolous. No effort to control a docket is at issue here, nor did the District Court rely on any such rationale.

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4. Nothing in the Court of Appeals' opinion suggests it was addressing only a narrow issue that it was convinced was not likely to recur.

Rather, the District Court has fashioned a procedural device that enables a petitioner to ignore the requisites of exhaustion and simply file a petition containing one or more exhausted claims that can then be held abeyant. Since the very reason for holding the petition abeyant--the contemplated amendment with additional claims of which the petitioner was already aware--violates the abuse of the writ doctrine, it cannot be justified as a valid exercise of discretion. Nor can the Rules Governing Section 2254 Cases be read to allow a district court to ignore this Court's interpretation of federal law.

The State's request that this Court grant the petition and restore the mandate of *Rose* does not merely affect a handful of cases. On the contrary, the issue could arise in any case, and there are many, in which a petitioner seeks to mark his place in federal court before he has exhausted his state court remedies. The implementation of a statute of limitations drives this effort in many cases. So too the ever increasing, and successful, delay in capital cases.

Taylor's Contemplated Second Amended Petition Constitutes an Abuse of the Writ as a Matter of Law

Taylor, misconstruing the issue, claims that the "State's putative concern is that the amended petition which eventually may be filed will not be subject to an abuse of the writ challenge." Opp. at 9. He also claims that the issue was not fully briefed and that the lower courts did not address it. *Id*. at 9, 20.

How Taylor can claim that the issue was not addressed below is difficult to comprehend. The State raised the argument before the district court, App. B at 39-40, and the issue was central to its argument before the Court of Appeals. That court not only considered the argument, it concluded the State was "clearly correct" in its contention that "'subsequent amendment of a formerly exhausted petition to add newly exhausted claims . . .

could be barred as an abuse of the writ.'" App. A at 17. The court noted Taylor had "candidly conceded" his anticipated second amended petition would be subject to an abuse of the writ challenge. *Id.* Taylor's refusal to accept this straightforward holding, Opp. at 21, is typical of his resistance to the imposition of any rule and his resort to claims that rulings contrary to his position are merely dicta.[5] *See, e.g.,* App. B at 32-33.

Taylor claims the State fails to address the significant drain on judicial resources that would result from requiring his election between dismissal and proceeding on his exhausted claims. Opp. at 17. Again, he misses the point of the State's argument. Taylor's failure to exhaust numerous claims establishes that he should not have filed a federal petition in the first place. He has created the drain on judicial resources and intends to further that drain by filing multiple amended petitions. He thinks he is entitled to maintain federal jurisdiction by parking his claims in federal court while he litigates other claims in state court, and that he is entitled to file an amended petition adding new claims following exhaustion.

The procedure he has followed, which the District Court and Court of Appeals have sanctioned, necessarily entails the filing of multiple petitions and the consequent delay in federal adjudication while the petitioner returns, sometimes repeatedly, to exhaust claims in state court. The State objects to this ping-pong game between state

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5. We note that despite the Court of Appeals' plain holding in this case, a subsequent Ninth Circuit panel, addressing an identical situation, asserted that "*Taylor*'s statement on this point is merely an observation and has not [sic] precedential effect." *Calderon v. United States District Court (Thomas)*, ___ F.3d at ___, 1998 WL 236971. Petitioners will therefore argue that amendment following abeyance is not subject to an abuse of the writ challenge, and the State will have to begin this entire process anew. We ask the Court to clarify this important issue, and hold that such an amendment is indeed an abuse of the writ.

and federal courts. Taylor has now filed a petition containing exhausted claims. He must pursue those claims. A future petition containing the newly exhausted claims will be abusive and thus must be dismissed under *McCleskey v. Zant*, 499 U.S. 467, because no excuse can justify Taylor's failure to properly present claims of which he was aware and which he deliberately withheld rather than proceed in conformance with this Court's mandate under *McCleskey* and *Rose*. A fortiori, Taylor cannot meet the standard for filing a successive petition under the Act. 28 U.S.C. § 2244(b)(2).

Taylor claims there would have been "wasteful litigation" over the applicability of the Act on a newly filed petition had he taken a dismissal rather than abeyance. Opp. at 18. In order to avoid such "wasteful litigation," Taylor contends the District Court properly allowed him to simply park his exhausted claims in federal court while he pursued exhaustion on other claims. His contention is frivolous. The State has already made clear its view that Taylor's filing of an amended petition in April 1977 mandates the Act's application. The filing of any future amended petition will necessarily also be subject to the Act. Taylor's assumption that this issue can be avoided because he thinks the Act does not apply to him is wishful thinking. In any event, it is only one aspect of the issue in this petition, which is whether a district court can ignore the rules of *McCleskey* and *Rose* by allowing the piecemeal presentation of claims through the procedural device of abeyance pending exhaustion followed by amendment.

Finally, Taylor asserts that "the equities" support the District Court's decision to hold his petition abeyant pending exhaustion. The State submits that no equities justify Taylor's piecemeal litigation. His game-playing, and that of petitioners who have engaged in the same tactics of delay and manipulation, must come to an end.

CONCLUSION

For the reasons stated, the State respectfully asks that the petition for writ of certiorari be granted.

Dated: June 22, 1998

Respectfully submitted,

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